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Torts—Negligence—Prima Facie Case

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no cause of action, for the categories of tort were closed.[12] By 1955, however, the doctrine of *prima facie* tort was generally accepted in the United States, with New York, in *Advance Music Corp. v. American Tobacco Co.*,[13] following the doctrine established by the United Staates Supreme Court in an opinion by Mr. Justice Holmes, announcing, " . . . *prima facie,* the intentional infliction of temporal damage is a cause of action, which, as a matter of substantive law, . . . requires a justification if the defendant is to escape."[14]

Under the *prima facie* tort theory, a motive, malicious, unmixed with any other, and exclusively directed to the injury and damage of the plaintiff, may make otherwise lawful conduct actionable.[15] But where defendant's conduct is ordinarily proper, such as reporting irregularity to the police, the burden would seem to be on the plaintiff to show a lack of justification.[16] It is an established presumption, which was relied upon in the present case, that everything done in pursuance of duty by a public official is properly and rightfully done until the contrary is shown.[17] Thus, it must necessarily be inferred that plaintiff's conduct was inimical to the interest of the public, and by holding the defendant immune from civil liability in exposing the plaintiff, despite his motive for so doing, the Court maintains a proper balance of the interests of society and that of the plaintiff. To allow plaintiff to recover here would eliminate an important part of the process of exposing those whose conduct does not conform to the standards set by society. By finding justification in this case, the Court has established a limitation on actions in *prima facie* tort which is not only logical but one with which few will quarrel.[18]

Negligence — Prima Facie Case

In *Lubelfeld v. City of New York*,[19] the Court of Appeals unanimously reversed the lower court's dismissal of the plaintiff's complaint. The plaintiff cabdriver was shot by Long, an intoxicated police officer while the latter was off duty. The plaintiff testified that his cab had been stopped by three uniformed police officers who directed him to take Long wherever he wished to go and that the shooting occurred shortly thereafter. The plaintiff argued that the uniformed policemen knew that Long was intoxicated, that they deemed it necessary to en-

12. New York Court of Appeals quoting P. A. Landon, Editor of Pollack's 14th Edition, in *Advance Music Corp. v. American Tobacco Co., supra* note 9.
13. *Supra* note 9.
14. Aikens v. Wisconsin, 195 U.S. 194 (1904). For an excellent review of the history of intentional torts, see, Halpern, *International Torts and the Restatement,* 7 BUFFALO L. REV. 7 (1957).
15. See Beardsley v. Kilmer, 236 N.Y. 80, 140 N.E. 203 (1923).
16. See Halpern, *supra* note 14 at 8.
17. In re Whitman, 225 N.Y. 1, 121 N.E. 479 (1918).
18. A good general discussion of the problem may be found in Beale, *Justification for Injury,* 41 HARV. L. REV. 553 (1928).
19. 4 N.Y.2d 455, 176 N.Y.S.2d 302 (1958).

gage a cab for him, and further that they knew or should have known that he was armed inasmuch as police regulations required police officers to carry a loaded revolver at all times. Under these conditions, it was alleged that they (and, by *respondeat superior,* the City) were negligent in allowing him to remain on the public streets armed and in an intoxicated condition. Plaintiff's testimony was contradicted by Long who claimed he had engaged the cab himself.

Since the complaint was dismissed, the Court of Appeals was required to give the plaintiff-appellant the benefit of every favorable inference which could be drawn from the record[20] and did not consider the question of credibility.[21] The Court concluded that there was sufficient evidence to entitle the plaintiff to go to the jury for a determination as to liability, inasmuch as reasonable men could reach differing conclusions on the basis of the facts presented.[22]

Negligence in Supervision of Pupils During Recess

Again this term the question of the sufficiency of evidence to constitute a *prima facie* case reached the Court of Appeals. The four essential elements to a negligence action in New York are (1) a duty owed by defendant to plaintiff, (2) a breach of that duty with (3) a resultant injury to the plaintiff, and (4) absence of contributory negligence.[23] In order to go to the jury, it is necessary that there be either a conflict in the evidence or uncontested evidence from which fair minded men might draw more than one inference.[24] "The sufficiency of evidence reasonable to satisfy a jury cannot be mechanically measured. It is incredible as a matter of law only where no reasonable man could accept it and base an inference upon it. That depends upon considerations which vary in accordance with the circumstances of the particular case."[25]

In *Decker v. Dundee Central School District,*[26] the lower court, after the jury returned a verdict for the plaintiff, dismissed the complaint, holding there was insufficient evidence to permit the jury to infer negligence. The Court of Appeals held that reasonable men could differ on the basis of the evidence presented and therefore reinstated the jury's verdict.[27]

20. Dunham v. Village of Canisteo, 303 N.Y. 498, 503, 104 N.E.2d 872, 875 (1952).
21. Swensson v. New York, Albany Desp. Co., 309 N.Y. 497, 505, 131 N.E.2d 902, 906 (1956).
22. See *Prima Facie Case — Scintilla of Evidence,* 7 BUFFALO L. REV. 73 (1957-58); *Prima Facie Case,* 6 BUFFALO L. REV. 146 (1956-57); *Prima Facie Case,* 5 BUFFALO L. REV. 63 (1955-56).
23. Kimbar v. Estis, 1 N.Y.2d 399, 153 N.Y.S.2d 197 (1956).
24. Veihelmann v. Manufacturers Safe Deposit Co., 303 N.Y. 526, 104 N.E.2d 888 (1952).
25. Blum v. Fresh Grown Preserve Corp., 292 N.Y. 241, 54 N.E.2d 809 (1944).
26. 4 N.Y.2d 462, 176 N.Y.S.2d 307 (1958).
27. See *Prima Facie Case — Scintilla of Evidence,* 7 BUFFALO L. REV. 73 (1957).